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No. 91-610

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, ET AL., PETITIONERS

v.

NICHOLAS DEMISAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. 186(c)(5), requires the trustees of multiemployer benefit plans to transfer part of the plans' reserves to new multiemployer funds set up by employers who leave the plans.

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INTEREST OF THE UNITED STATES

The Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the duties of trustees of multiemployer benefit plans subject to the Labor-Management Relations Act of 1947 (LMRA) and the Employee Retirement Income Security Act of 1974 (ERISA). The Secretary of Labor (the Secretary) has significant enforcement responsibilities under Title I of ERISA. The PBGC, a wholly owned United States government corporation, is responsible for administering and enforcing Title IV of ERISA, including the Multiemployer Pension

Plan Amendments Act of 1980 (MPPAA). As we explained in our brief filed at the petition stage at the Court's invitation, the question whether Section 302(c)(5) of the LMRA requires a multiemployer fund to transfer assets to a new multiemployer fund established by withdrawing employers and their employees' collective bargaining representative is an important question with significant ramifications for the administration of multiemployer plans.

STATEMENT

1. Concern about the "corruption of collective bargaining through bribery of employee representatives by employers" and related evils led Congress to enact Section 302 of the LMRA, 29 U.S.C. 186. *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). That provision generally prohibits the transfer of money from employers to union officials.[1] Transfers of money in violation of Section 302 are criminal offenses, 29 U.S.C. 186(d), and federal courts have jurisdiction to restrain such violations, 29 U.S.C. 186(e).

Subsection (c) of Section 302 sets forth several exceptions to these broad prohibitions. The exception pertinent to this case allows employers to pay money "to a trust fund established by [the employees'] representative." Section 302(c)(5), 29 U.S.C. 186 (c)(5). This ameliorative provision protects employees by imposing a number of requirements on the operation of such funds. Section 302(c)(5) re-

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[1] The statute provides in relevant part: "It shall be unlawful for any employer * * * to pay, lend, or deliver * * * any money or other thing of value * * * to any representative of any of his employees." Section 302(a)(1), 29 U.S.C. 186(a)(1).

quires that the fund be established as a trust pursuant to a written agreement; that employers and employees be represented equally in administration of the fund; and that pension funds be kept separate from other funds. See 29 U.S.C. 186(c)(5)(A)-(C). This case involves Section 302(c)(5)'s additional requirement that the funds be used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."

2. Petitioners are multiemployer pension and welfare benefit funds (the Greater Funds)[2] and their trustees. The Greater Funds were established pursuant to a collective bargaining agreement between a multiemployer bargaining association, Greater New York Health Care Facilities Association, Inc. (the Greater Association), and Local 144 of the Hotel, Hospital, Nursing Home and Allied Services Employees Union (the union). Respondents include a group of employers (the Southern employers), management companies, and employees (the Southern employees) that broke away from the Greater Association, and eventually established new multiemployer pension and welfare funds through collective bargaining with the union. Pet. App. 2a-3a, 14a.

In 1981, the Southern employers left the Greater Association to form Southern New York Residential Health Care Facilities, Inc., a separate multiem-

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[2] The Greater Funds are the Local 144 Nursing Home Pension Fund (Greater Pension Fund) and the New York City Nursing Home-Local 144 Welfare Fund. Pet. App. 13a.

ployer bargaining association. At that time, the Southern employers negotiated individual agreements with the union under which they continued to contribute to the Greater Funds on behalf of their employees. Pet. App. 3a, 13a-14a. In 1984, however, the Southern employers negotiated agreements with the union establishing new funds (the Southern Funds) for their employees. *Id.* at 3a, 14a-15a.[3] The 1984 collective bargaining agreements between the Southern employers and the union provided that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds. *Id.* at 15a. The agreements also required the Southern employers to provide the same level of benefits that the Greater Funds provided. *Id.* at 3a. The agreements did not provide for a transfer of assets from the Greater Funds, but stated that the Southern employers could sue to compel a transfer and that the union would "not oppose such a suit provided that the suit was consistent with applicable law." *Ibid.* (internal quotation marks omitted).

Trust agreements were executed in October 1985, and the Southern Funds' trustees agreed that the Funds would become operational on December 1, 1985. Pet. App. 4a. With respect to employees whose rights under the Greater Pension Fund had not vested at the time of the withdrawal, the trustees agreed that the Southern Pension Fund would give credit for years of service in employment covered by the Greater Pension Fund. Accordingly, an employee with, say,

[3] The newly established funds are the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund (Southern Pension Fund) and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund. Pet. App. 13a.

nine years of credited service under the Greater Pension Fund would satisfy the ten-year vesting requirement of the Southern Pension Fund after one year of additional service. With respect to employees whose benefits with the Greater Pension Fund already had vested at the time of the withdrawal, the Southern Pension Fund agreed to supplement the amount due from the Greater Pension Fund so that the total amount received would equal the total amount the employee would have received if his employer had not left the Greater Association.[4] Thus, the Greater Pension Fund remained fully liable for all vested liabilities incurred as of the date of withdrawal. *Id.* at 3a-4a, 16a.

3. To help finance the Southern Funds, respondents sought to have petitioners transfer a portion of the assets of the Greater Funds to the Southern Funds. When petitioners refused, respondents commenced this action in the United States District Court for the Southern District of New York, arguing, among other things, that the trustees of the Greater Funds had violated the "sole and exclusive benefit" provision of Section 302(c)(5) and breached their fiduciary duties under ERISA by refusing to transfer a portion of the Greater Funds' assets to the Southern Funds. Pet. App. 16a-17a.

The district court ruled in favor of the Greater Funds on both grounds. Pet. App. 13a-29a. The court concluded that Section 302(c)(5) imposes a duty to transfer assets only when necessary to facilitate the right of employees to change their collective bargain-

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[4] For example, "an employee retiring with twenty five years of combined service, with eight years under the Southern Pension Fund, would receive eight/twenty-fifths of his total benefit from the Southern Pension Fund." Pet. App. 16a n.5; see *id.* at 4a.

ing representative. Because the same union represented the Southern employees both before and after the withdrawal, the trustees were not required to transfer the funds under that construction of the LMRA. Pet. App. 19a-21a.[5]

The district court also rejected the Southern Funds' contention that they "have assumed the liabilities of the Greater Funds and * * * the assets attributable to those liabilities must follow those liabilities." Pet. App. 24a. The court concluded that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds," and explained: "It is true that the Southern Pension Fund does recognize past years of service for those employees who had not vested under the Greater Pension Fund, but that was a decision made by the Southern Fund trustees after establishment of those funds." *Ibid.*

The district court further noted that in 1980 Congress amended ERISA-by adopting MPPAA, "a comprehensive statute regulating employer withdrawal from pension plans." Pet. App. 25a. Under MPPAA, however, a transfer of assets and liabilities is mandated only when an employer withdraws "as a result of a certified change of collective bargaining representative." 29 U.S.C. 1415. Moreover, while MPPAA bars plans from adopting asset transfer rules that

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[5] The court stated that the transfer sought in this case would redound to the benefit of the employers, not the employees, because it would reduce the employers' obligation to contribute to the new Southern Funds they had chosen to create. In the court's words, "[i]t would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw." Pet. App. 21a.

"unreasonably restrict the transfer of assets in connection with the transfer of liabilities," 29 U.S.C. 1414, the court concluded that "this section would be relevant to this case only if there had been a transfer of liabilities." Pet. App. 27a. The court went on to hold that the trustees of the Greater Funds had breached no duty under ERISA. *Id.* at 28a.

4. The court of appeals, speaking through Judge Pratt, reversed. Pet. App. 1a-12a. The court first rejected petitioners' argument that ERISA governed this matter to the exclusion of the LMRA, stating that the plans at issue were "governed *jointly* by the LMRA and ERISA." *Id.* at 6a. The court emphasized that Section 302(c)(5)'s "sole and exclusive benefit" requirement is a statutory recognition that employer payments to a trust fund are in exchange for employees' labor and thus should benefit the employees on whose behalf they were made. Pet. App. 8a-9a. The court concluded that Section 302(c)(5) therefore imposes a tight link between the use of funds in a multiemployer benefit plan and the employees on whose behalf the funds were contributed. The court reasoned that "[i]t is only just, said Congress, that the employe [*sic*] whose hour's work required the employer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment." *Id.* at 9a. The court further concluded that a failure to require the transfer of reserves to the Southern Funds "would operate as a windfall to the Greater Funds." *Ibid.*

The court rejected petitioners' reliance on the language of Section 302(c)(5), which permits a fund's assets to be used not only for the benefit of the employees on whose behalf the contributions were made, but also for the benefit of "employees of other em-

ployers" who contributed to the same fund. Pet. App. 10a-11a. The court acknowledged that Section 302(c)(5) does not require multiemployer funds to tie the benefits of employee-participants to contributions made on their individual behalf. Pet. App. 10a. In the court's view, however, Section 302(c)(5) nonetheless requires a transfer whenever "there is no chance, actuarial or otherwise, that any of the 'employees of [the departing] employer' [other than employees whose benefits already had vested] will ever receive benefits based on their contributions." *Id.* at 11a. The court concluded that "the only way that Southern Employees could ever receive the 'sole and exclusive benefit' of their employers' contributions to the Greater Funds * * * would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds." *Ibid.*

The court remanded the case to the district court to determine what portion of the reserves of the Greater Funds should be reallocated to the Southern Funds, stating that in fashioning a transfer order the district court should be guided by the principle that "a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made." Pet. App. 12a.

Because the court ruled that the transfer was required by Section 302(c)(5) of the LMRA, it did not reach respondents' claim that the fiduciary duties imposed by ERISA also obligated petitioners to transfer a portion of the assets of the Greater Funds. Pet. App. 12a.

SUMMARY OF ARGUMENT

1. Section 302(c)(5) imposes a simple limitation on the use of funds contributed to employee benefit plans: they must be used "for the sole and exclusive benefit" of two classes of people: (a) "the employees of [the] employer [who contributed the funds], and their families and dependents"; and (b) "the employees of other employers making similar payments, and their families and dependents." The court of appeals' holding—that Section 302(c)(5) prohibits the use of funds for the benefit of "the employees of other employers making similar payments"—cannot be reconciled with the language of the statute.

That holding also is inconsistent with the basic structure of multiemployer plans. The fundamental concept on which such plans rest is that a group of employers contribute funds, which jointly are to be used for the benefit of the employees of all employers in the group. This concept is undermined by allowing a new plan established for the benefit of the employees of a single employer or group of employers to reclaim funds when they leave the plan.

The principal basis the court of appeals offered to justify its holding was the view that a contrary rule would penalize departing employees unfairly, by depriving them of the benefit of contributions made to the plan on their behalf. But this argument proves too much. The court of appeals itself acknowledged that trustees are not required to transfer funds whenever employees leave a plan. That being the case, the only rule consistent with Section 302(c)(5) is one allowing the funds to be used for the remaining employees.

2. In its haste to do equity, as it saw it, the court of appeals brushed past Congress's detailed regula-

tion of asset transfers between multiemployer pension plans. MPPAA provides specific rules governing withdrawal from multiemployer plans, describes employers' liability to the plans when they leave, and imposes an obligation on plan trustees to transfer funds to a new plan set up by departing employers in a single, narrowly defined circumstance not present in this case. It is highly unlikely that Congress would have imposed such a narrowly defined obligation if the LMRA already created a broad rule requiring a transfer.

Similarly, the Second Circuit's decision rests on the assumption that the economic relations between a pension plan and departing employers necessarily depend on the amount of contributions and liabilities attributable to the employees of the departing employers. This approach is in tension with 29 U.S.C. 1391. That provision allows trustees to choose from several methods for calculating withdrawal liability; only one of these methods is based on the amount of liabilities attributable to employees of the departing employer. The court of appeals' approach also creates a perverse incentive by making withdrawal from multiemployer plans more attractive, even though Congress intended, through MPPAA, to make withdrawal less attractive.

Finally, reversal of the Second Circuit's ill-conceived decision would not leave employees unprotected. ERISA requires trustees to comply with strict fiduciary standards in all aspects of their administration of the plan, including their determination whether to transfer plan assets to a new plan set up by departing employers. Consideration of cases like this under ERISA's general fiduciary duty—as opposed to the simplistic per se rule the court of appeals derived from the LMRA—will allow trustees to make

decisions that take into account the interests of *all* participants in the plan, whether they have departed or remained.

ARGUMENT

SECTION 302(c)(5) OF THE LMRA DOES NOT REQUIRE A TRANSFER OF PLAN ASSETS FROM A MULTIEMPLOYER BENEFIT PLAN WHENEVER AN EMPLOYER WITHDRAWS AND ESTABLISHES A NEW PLAN

A. The Asset Transfer Rule Adopted By The Court Of Appeals Is Not Supported By The Language Or Purpose Of Section 302(c)(5)

The court of appeals erred by concluding that Section 302(c)(5) of the LMRA establishes a per se rule that the trustees of a multiemployer plan must transfer assets any time an employer withdraws and sets up a new multiemployer plan. The fundamental premise on which that conclusion rests is that trustees who fail to hand over funds to a new multiemployer plan set up by withdrawing employers violate the LMRA by refusing to use the funds entrusted to them for the "sole and exclusive benefit" of the employees on whose behalf the funds were contributed. See Pet. App. 10a-11a.

The court of appeals' premise cannot be reconciled with the language of Section 302(c)(5) itself. That provision permits the use of such funds not only for the "sole and exclusive benefit of the employees of [the] employer" that contributed them, but also for the benefit of "the employees of other employers making similar payments."[6] Thus, Section 302

[6] Section 302(c)(5) authorizes payments by an employer of:

money or other thing of value * * * to a trust fund established by [an employee] representative, for the sole and

(c)(5) does not require trustees of multiemployer funds to segregate payments made by each employer and to use such payments solely for the benefit of the employees of the contributing employer; to the contrary, the statute permits trustees administering multiemployer plans to pool employer contributions for the purpose of paying benefits to *all* participants in the plan. The only requirement established by the provision at issue is that the trustees must use the funds for "the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 570 (1982) (rejecting a claim that Section 302(c)(5) requires eligibility rules embodied in a collective bargaining agreement to be reasonable); see *id.* at 572 ("None of the conditions [specified in Section 302(c)(5)] places any restriction on the allocation of the funds among the persons protected by § 302(c)(5)."); *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1022 (7th Cir. 1989).

The court of appeals' view that the LMRA grants employees a right to trace and claim the contributions of their particular employers is at odds not only with the language of the statute, but with the basic structure of multiemployer plans. Once contributions enter such plans, the funds are tied neither to the individual employees on whose behalf the contributions were made, nor to the workforce of the employer that made the contributions. For example,

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exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents *jointly with the employees of other employers making similar payments, and their families and dependents*) [emphasis added].

contributions made "on behalf of" an employee who leaves a pension plan before serving long enough for his pension to vest will never benefit that employee in any way (unless he subsequently returns to the plan). Those contributions, pooled with all other contributions made on behalf of all other employees, instead will be used to defray the costs of benefits paid to other participants in the plan, including the employees of other employers.[7] Similarly, an employee's right to receive vested benefits continues even if his employer withdraws from the plan or otherwise ceases making payments.[8]

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[7] See *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Stinson*, 869 F.2d at 1022; *Local Union No. 5* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (6th Cir. 1976) ("That the [fund's] rule results in certain employers' contributions being used for other than their employees does not violate the 'sole and exclusive benefit' requirement. Such imprecision is part and parcel of a pooled fund specifically authorized through 29 U.S.C. § 186(c)(5)." (citations omitted)); cf. 26 U.S.C. 413(b)(3) (in determining whether a multiemployer benefit plan meets the "exclusive benefit" requirement of Section 401 of the Internal Revenue Code, all plan participants shall be considered to be employees of the contributing employer); 26 C.F.R. 1.413-1(d) (regulation implementing Section 413 (b)(3)).

[8] See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 567 n.7, 579 n.20 (1985); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 53 (1980) (multiemployer pension plans are preferable because they "enabl[e] a plan participant to retain benefit credits earned * * * even though the employer subsequently ceases contributing to the plan[, so that other employers] have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer").

In addition, the court of appeals' interpretation of Section 302(c)(5) stretches the language of the statute to further a purpose far afield from that at which Section 302 is directed. As this Court has explained, the legislative history of the provision shows that "[t]hose members of Congress who supported [Section 302's general prohibition on employer payments to employee representatives] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see *Robinson*, 455 U.S. at 572 (noting Congress's concern "that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers"); *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 474 (1960) (Frankfurter, J., dissenting). Congress responded to that concern in Section 302(c)(5) by enumerating specific standards "to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Arroyo*, 359 U.S. at 426; see *Robinson*, 455 U.S. at 572 (noting that "[e]ach of the specific conditions [in Section 302(c)(5)] is consistent with the nondiversion purpose"). Because the conduct at issue in this case poses no risk that assets will be diverted from participants in the plan, let alone to the benefit

of union officials, the purpose of the statute does not support the Second Circuit's broad interpretation of the language of Section 302(c)(5).

The court of appeals' error is made particularly clear by the court's unwillingness to pursue its rationale to its logical conclusion. The court recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan. See, *e.g.*, *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984) ("To claim that monies retained by the Funds contributed by an employer on behalf of all of its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and [the] fund would be an unfair and unrealistic construction of section 302(c)(5)."), cert. denied, 469 U.S. 1212 (1985). The court of appeals distinguished *O'Hare* as limited to situations in which "*some*, but not all, of an employer's employees" changed plans. Pet. App. 10a. By contrast, the court stated, judicial intervention is required when the employer leaves with all of its employees, because "there is no chance, actuarial or otherwise, that any of the 'employees of such employer' will ever receive benefits based on their contributions." *Id.* at 11a. But if the reason for judicial intervention is, as the court of appeals held, that Section 302(c)(5) is violated when "employees [do not] enjoy the 'sole and exclusive benefit' of their efforts," Pet. App. 9a, then there is no justification for the distinction articulated by the court of appeals. At bottom, if the statute requires contributions to be expended for the "sole and exclusive benefit" of the employees on whose behalf the contributions were made, trustees would be required to

transfer funds whenever employees leave a plan, whether or not their employer leaves the plan as well. The obvious inconsistency of that result with the nature of multiemployer plans demonstrates that the court of appeals' underlying premise is incorrect as well.[9]

B. Congress's Regulation Of Asset Transfers And Employer Withdrawals In ERISA Supports The Conclusion That The LMRA Does Not Mandate This Asset Transfer

This Court should be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 147 (1985). In holding that Section 302(c)(5) of the LMRA implicitly imposes a categorical rule governing the transfer of assets between multiemployer plans, the court of appeals failed to recognize that Congress comprehensively regulated the topic in ERISA. In particular, Title IV of ERISA contains specific provisions governing transfers of assets of

[9] In any event, it is clear on the facts of this case that many of the Southern employees will continue to receive benefits from the Greater Funds. First, as the court of appeals noted (Pet. App. 4a, 11a), those Southern employees whose pension rights vested before the withdrawal will receive pension benefits from the Greater Pension Fund. Also, the Greater Pension Fund may be obligated to pay benefits to Southern employees whose benefits had not vested at the time of withdrawal if those employees subsequently go to work for an employer that contributes to the Greater Pension Fund and thereafter vest on the basis of all service under the Greater Pension ~~Fund,~~ including the time they worked for Southern employers before the withdrawal. See 29 U.S.C. 1053(b)(3), 1054(e).

multiemployer pension plans. 29 U.S.C. 1411-1415; see also 29 C.F.R. Pt. 2672 (PBGC's regulations implementing 29 U.S.C. 1411).[10] In addition, Title I of ERISA imposes a general fiduciary duty on welfare and pension plan trustees that obligates them to consider asset transfer requests in good faith. 29 U.S.C. 1104.

1. MPPAA casts doubt on the decision of the court of appeals in two ways. First, MPPAA's express requirement that trustees transfer pension plan assets in certain narrowly defined circumstances would be largely superfluous if the court of appeals were correct in concluding that the LMRA generally requires asset transfers whenever employers withdraw and establish new plans. Second, the decision of the court of appeals is in tension with MPPAA's general structure and purpose, because the decision makes withdrawal from multiemployer plans more attractive.

a. Part 2 of Subtitle E of Title IV of ERISA ("Merger or Transfer of Plan Assets or Liabilities"),

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[10] As the name suggests, the Multiemployer Pension Plan Amendments Act of 1980, in which Sections 1411-1415 were enacted, applies only to pension plans, not welfare plans. See *Trustees of Local 546 Health & Welfare Fund* v. *Lith-O-Kraft Plate Co.*, 692 F. Supp. 782 (N.D. Ohio 1988) (MPPAA does not apply to welfare plans); accord Pet. App. 25a n.16; see also MPPAA, Pub. L. No. 96-364, § 1, 94 Stat. 1208 (setting out official title of MPPAA). Congress's omission of similar requirements for welfare plans is consistent with its decision to subject welfare plans to considerably less stringent regulation under ERISA than pension plans. See 29 U.S.C. 1051(1) (exempting employee welfare benefit plans from minimum participation and vesting requirements); 29 U.S.C. 1081(1) (exempting employee welfare benefit plans from funding requirements).

which was added by MPPAA, expressly addresses the obligation of trustees to transfer assets in connection with the withdrawal of an employer from a multiemployer pension plan. First, Section 1411(a) prohibits any transfer of assets between multiemployer pension plans except in accordance with the procedures set forth in Section 1411(b).[11] Subsection (b), in turn, requires notice to the PBGC at least 120 days before the proposed transfer, Section 1411(b)(1), and imposes a number of additional restrictions designed to prevent certain transfers that may harm participants, Section 1411(b)(2)-(4).[12] In our view, the court of appeals should not have ordered petitioners to transfer assets between pension plans without considering whether the transfer satisfied the requirements of Section 1411(b).[13]

Second, Title IV of ERISA mandates the transfer of assets between multiemployer pension plans in one

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[11] "[A] plan sponsor may not cause a multiemployer plan to * * * engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such * * * transfer satisfies the requirements of subsection (b) of this section." 29 U.S.C. 1411(a).

[12] Section 1411(b)(2) provides that no participant's accrued benefit may be lower immediately after the transfer than it was immediately before the transfer. Section 1411(b)(3) provides that a transfer may not occur unless benefits are not expected to be suspended. Section 1411(b)(4) requires a recent actuarial valuation of the affected plans.

[13] Petitioners did not argue to the court of appeals that the transfer requested by respondents would have violated Section 1411. Nevertheless, the court of appeals should have required that the statutory notice to PBGC be given before consummation of any transfer and should have examined whether the other requirements of the Section had been met.

circumstance only: when an employer has withdrawn from a multiemployer pension plan as a result of a certified change of collective bargaining representative and the covered employees will be participants in another multiemployer pension plan. In such circumstances, Section 1415 requires multiemployer pension plans to transfer certain assets *and* liabilities to the new multiemployer plan. Because in this case the same union continued to represent the affected employees after the Southern Employers' withdrawal, Section 1415 did not require a transfer.

Third, Section 1414(a) addresses asset transfers indirectly, by providing that any rules a plan adopts to govern transfers must "not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities." That provision imposes no obligation to transfer either assets or liabilities; it merely mandates that if a plan decides to transfer liabilities, any related transfer of assets must comply with uniformly applied plan rules that do not unreasonably restrict the transfer of assets in connection with the transfer of liabilities. Accordingly, because no liabilities were transferred from the Greater Pension Fund to the Southern Pension Fund, Section 1414(a) has no application to this case. See *Vornado, Inc.* v. *Trustees of Retail Store Employees' Union Local 1262*, 829 F.2d 416, 419-421 (3d Cir. 1987).[14]

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[14] In explaining how reallocation should be fashioned on remand, the court of appeals stated that reserves should be transferred from the Greater Funds in proportion to the "liabilities now undertaken by the Southern Funds." Pet. App. 11a. The court of appeals apparently was referring to the Southern Pension Fund's unilateral decision to give non-vested employees credit for the time their employers

In light of these detailed provisions regarding transfers of assets, it would be anomalous to interpret Section 302(c)(5), which does not mention asset transfers, to impose the categorical rule adopted by the court of appeals. Moreover, in language similar to that of Section 302(c)(5), ERISA since its enactment has required that the assets of employee benefit plans "be held for the exclusive purposes of providing benefits to participants in the plan." 29 U.S.C. 1103(c)(1). Yet Congress plainly did not view that provision as imposing a categorical transfer requirement because it added Section 1415(a) to the statute in 1980, which specifies a single circumstance when such a transfer of assets between multiemployer pension plans is required. Hence, the interpretation of the court of appeals renders Section 1415(a) largely superfluous.[15] And the detailed provisions of Title IV

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contributed to the Greater Funds on their behalf. But as the district court explained, "an assumption of liability for * * * past service credit * * * is not the same as a transfer of liabilities from the Greater Funds to [the Southern Funds], since the latter implies that the Greater Funds had a pre-existing obligation to those who left the plan, which is simply not the case here." *Id.* at 24a. The PBGC's regulations define "transfer of assets or liabilities" between pension plans as "a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans." 29 C.F.R. 2670.3. Because the Greater Pension Fund in fact retained all the Southern employees' pension liabilities that had accrued at the time of withdrawal, there was no "transfer" of liabilities in this case.

[15] The court's interpretation may not render Section 1415(a) entirely superfluous because that provision requires the transfer of assets and liabilities even when there has been only a partial withdrawal from a multiemployer plan

of ERISA deeply undercut the court of appeals' conclusion that the LMRA's spare language broadly requires transfers of assets whenever employers leave multiemployer plans. Compare *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 569-570 (1979) ("[t]he existence of * * * comprehensive legislation [in ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Act to noncontributory, compulsory pension plans," particularly where "Congress believed that it was filling a regulatory void when it enacted ERISA").[16]

b. Moreover, by granting employers a ready means to fund new plans, the court of appeals has not only

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resulting from a change of a collective bargaining representative. Such a withdrawal can occur, for example, if "the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan." 29 U.S.C. 1385 (b) (2) (A) (i). It is possible, in light of the court of appeals' distinction of earlier precedent that did not require a transfer when only some of an employer's employees left the plan, that the court of appeals would not require a transfer under circumstances where a transfer would be required by Section 1415(a). But such a distinction would undermine the purported basis for the court's holding in this case, because the funds nevertheless would not be used for the benefit of the employees on whose behalf they were contributed.

[16] See also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 181 (1989) ("We should be reluctant * * * to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

obviated the need for Section 1415(a), it positively has undermined the policies of MPPAA by making withdrawal from multiemployer plans substantially more attractive. A central theme of MPPAA was to protect plans from the adverse consequences of employer withdrawal and to reduce the incentives for such withdrawals. See *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S. 717, 721-722, 130 (1984); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 67-68 (1980) ("The purpose [of MPPAA] is * * * to eliminate the incentive to pull out of a plan."). Accordingly, Congress established special rules governing liability for withdrawals from multiemployer pension plans, which were designed to ensure that employers who withdraw pay their share of the plan's unfunded vested benefits. 29 U.S.C. 1381. The court of appeals has inverted this principle by creating a blanket rule based in the LMRA that imposes liability on the *plan* in connection with employer withdrawals.

In addition, the rules Congress has established to govern withdrawal liability all recognize that multiemployer plans involve the pooling of liabilities. See 29 U.S.C. 1391(b), 1391(c)(2), 1391(c)(3), 1391(c)(4). Three of the four methods from which trustees may choose do not tie a withdrawing employer's liabilities to the unfunded pension benefits attributable to its employees at all; the fourth method (the "direct attribution method")—which is said to be "completely impracticable" for "most multiemployer plans," D. McGill & D. Grubbs, Jr., *Fundamentals of Private Pensions* 628 (6th ed. 1989)—makes a withdrawing employer responsible for any unfunded vested benefits attributable to its employees and for a pro rata share of the unfunded vested benefits of "or-

phaned" employees (such as participants whose employers have gone out of business) as well.

2. In ERISA, Congress established a categorical transfer requirement only with respect to multiemployer pension plans and only where there has been a change in the employees' collective bargaining representative. At the same time, however, it is a fundamental precept of ERISA that plan trustees must comply with "strict fiduciary standards" in the discharge of their duties. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981).[17] These fiduciary standards limit the discretion of plan trustees to refuse to transfer assets when a group of participating employers and their employees break off to form a new plan.[18]

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[17] Although the Court has recognized that Section 302(c)(5) of the LMRA implicitly imposes similar fiduciary duties on plan administrators by requiring them to hold plan assets "in trust," see *Amax Coal Co.*, 453 U.S. at 330, it is not clear whether the fiduciary duties created by the LMRA are enforceable in federal courts. See *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573 n.12 (1982) ("The [*Amax Coal Co.*] Court did not decide, nor do we decide today, whether federal courts * * * are authorized to enforce those duties."). The question has limited practical importance in light of the ability of federal courts to enforce the similar duties imposed by ERISA. See 29 U.S.C. 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable."); 29 U.S.C. 1132(a)(2) ("A civil action may be brought * * * by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.").

[18] The petition did not present, and this Court's grant of certiorari does not encompass, the question whether the trustees' refusal to transfer funds violated the fiduciary duty

ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Similarly, trustees are prohibited from "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2).[19]

These strict prohibitions require the trustees to consider the interests of departing participants, as well as the remaining participants and the plan as a whole. See *Vornado*, 829 F.2d at 421 ("The trustees must reach all decisions guided by their fiduciary responsibilities; they must consider the welfare of the fund and the beneficiaries and are not free to reject all proposed transfers."). To be sure, legitimate fiduciary considerations may suggest that the best interests of all the participants would be served by refusing to transfer assets. Thus, a new plan's failure to request a transfer of liabilities from the old plan

created by ERISA, because the court of appeals ruled in favor of respondents on the LMRA issue and thus had no occasion to consider respondents' claim that petitioners' refusal to transfer assets breached their fiduciary duties under ERISA. See Pet. App. 12a.

[19] In this regard, 29 U.S.C. 1411(c) provides that the transfer of assets or liabilities between multiemployer plans shall be deemed not to be a violation of Section 1106(a) or (b)(2) if the PBGC determines that the merger or transfer otherwise satisfies the requirements of Section 1411.

(as appears to be the case here) tends to support a fiduciary decision not to transfer plan assets. In any case, prudence requires that trustees consider, among other things, the short- and long-term effects on the plan, whose benefit promises, funding obligations, and currently available assets would be affected by the proposed transfer of funds. Finally, trustees also must consider whether the proposed transfer complies with the asset transfer rules established by Title IV of ERISA, 29 U.S.C. 1411-1415. In sum, trustees must consider requests from departing employers in accordance with the general fiduciary requirements ERISA imposes on them and in accordance with the specific rules established by MPPAA; the appropriate response will depend upon the circumstances of the existing plan and the requested transfer.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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